No. 14-1146

IN THE
Supreme Court of the United States

TYSON FOODS, INC.,

Petitioner,

v.

PEG BOUAPHAKEO, *et al.*, individually and on behalf of all other similarly situated individuals,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICUS CURIAE* OF ATLANTIC LEGAL FOUNDATION AND THE INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether differences among individual class members may be ignored and a class action certified under Federal Rule of Civil Procedure 23(b)(3), or a collective action certified under the Fair Labor Standards Act, where liability and damages will be determined with statistical techniques that presume all class members are identical to the average observed in a sample.

2. Whether a class action may be certified or maintained under Rule 23(b)(3), or a collective action certified or maintained under the Fair Labor Standards Act, when the class contains hundreds of members who were not injured and have no legal right to any damages.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, *amici curiae* Atlantic Legal Foundation and International Association of Defense Counsel state the following:

Atlantic Legal Foundation is a not for profit corporation incorporated under the laws of the Commonwealth of Pennsylvania. It has no shareholders, parents, subsidiaries or affiliates.

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INTEREST OF *AMICI CURIAE*[1]

The Atlantic Legal Foundation is a non-profit public interest law firm founded in 1976. Its mandate is to advocate and protect the principles of less intrusive and more accountable government, a market-based economic system, and individual rights. It seeks to advance this goal through litigation and other public advocacy and through education. Atlantic Legal Foundation's board of directors and legal advisory committee consist of legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists.

The International Association of Defense Counsel ("IADC"), established in 1920, is an association of approximately 2,500 corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration

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[1] Pursuant to Rule 37.2(a), all parties have consented to the filing of this brief. The consents have been lodged with the Clerk.

Pursuant to Rule 37.6, *amicus curiae* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* nor its counsel made a monetary contribution to the preparation or submission of this brief.

of civil justice and continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, culpable defendants are held liable for appropriate damages, and non-culpable defendants are exonerated and can defend themselves without unreasonable cost. In particular, the IADC has a strong interest in the fair and efficient administration of class actions.

The abiding interest of *amici* in the proper application of class actions is exemplified by their participation as *amicus* or as counsel for *amici* in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) and other cases in this Court.

Amici believe that the decisions of the lower courts in this case are inconsistent with fundamental limits on class actions and the recent teaching of this Court regarding the preservation of class action defendants' due process rights. *Amici* are concerned that the decision below, certifying a class based on estimates of the overtime a hypothetical "average" employee might have worked, includes persons who were not in fact injured, and thus have no entitlement to damages, and deprives a defendant in a class or collective action of the right to litigate and prove all of its defenses to individual claims.

INTRODUCTION

This Court has recently taught that a class cannot be certified unless and until the court concludes, "'after a rigorous analysis,'" that the four prerequisites of Rule 23(a) – numerosity,

typicality, commonality, and adequacy of representation – are met. *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S.Ct. 2541, 2551 (2011). In cases in which class certification is sought under Rule 23(b)(3), the inquiry into whether common questions will predominate over individualized issues "is even more demanding." *Comcast Corp.* v. *Behrend*, 133 S.Ct. 1426, 1432 (2013). The predominance inquiry begins "with [an examination of] the elements of the underlying cause of action," *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 131 S.Ct. 2179, 2184 (2011), and focuses on whether there is "'some fatal dissimilarity' among class members that would make use of the class-action device inefficient or unfair," *Amgen, Inc.* v. *Conn. Ret. Plans & Trust*, 133 S.Ct. 1184, 1197 (2013). Adherence to that methodology in this case would have disclosed a "fatal dissimilarity" among class members that would have precluded certification. The lower courts' allowance of the use of an "average" worker and "average" times disguised wide disparities in the amount of time it took different class members to perform the "donning" and "doffing" activities plaintiffs alleged entitled the class to damages for underpayment of overtime wages.

Plaintiffs are hourly workers at a pork-processing facility who sought overtime compensation and liquidated damages under the Fair Labor Standards Act and Iowa law on the theory that Tyson's "gang time" compensation system failed to compensate them fully for time spent "donning," "doffing," and cleaning personal

protective equipment and walking to and from their work stations. There were significant differences, however, in the types of personal protective equipment individual workers wore, and large differences in the amount of time each worker spent on those activities. There were also differences in the total number of hours individual workers spent on other work activities in any given week, and differences in the amount of time for which Tyson compensated individual workers for donning and doffing activities. Questions of fact whether individual workers were deprived of any overtime compensation, and, if so, how much overtime pay was owed, outweighed common legal questions.

Despite differences among class members admitted by plaintiffs' experts, and despite the admitted inclusion of over 200 employees who were owed no unpaid overtime compensation at all, the district court certified (and later refused to decertify) a class of over 3,300 employees, finding that the legality of the Tyson's compensation system was a common question that predominated over individualized questions of injury or damages. The district court permitted plaintiffs to "prove" classwide liability and damages with purportedly "common" statistical evidence that erroneously presumed that *all* class members were identical to a fictional "average" employee. The use of the hypothetical "average" employee disguised vast disparities among individual workers with respect to the time spent on donning, doffing, and cleaning personal protective equipment, and elided

significant differences in entitlement to any overtime pay and the amount of overtime pay owed.

On appeal, the majority sought to distinguish and skirt, rather than to apply, this Court's recent class certification teaching, particularly *Wal-Mart* v. *Dukes*. *See, e.g.*, Pet. App. at 10a-11a, 13a. The Eighth Circuit panel ignored the many individualized issues bound up in plaintiffs' claims. As the dissenting circuit judge wrote, Tyson was found liable for substantial damages based on an "undifferentiated presentation[ ] of evidence," and the jury announced a "single-sum class-wide verdict from which each purported class member, damaged or not, will receive a pro-rata portion of the jury's one-figure verdict." Pet.App. 24a (Beam, J. dissenting).

Rule 23(b)(3) does not authorize an award of damages to individuals who were not harmed simply because their claims are aggregated with others who were. This Court's decisions do not permit courts to ignore the factual differences among class members that require individualized inquiry or to use statistics to eliminate the legal significance of such differences solely to allow Rule 23(b)(3)'s predominance standard to be met.

The lower courts' criteria for class certification in this case effectively deprived Tyson of its due process right to raise every available defense and altered substantive rights in violation of the Rules Enabling Act, 28 U.S.C. §2072(b).

FACTUAL BACKGROUND

The plaintiffs are hourly employees at Tyson Foods's meat-processing facility in Storm Lake, Iowa. They allege that Tyson violated the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, *et seq.*, and the substantially identical Iowa Wage Payment Collection Law (IWPCL), Iowa Code 91A.1, *et seq.*, because Tyson failed to adequately compensate them for all hours worked in excess of 40 hours per week, by failing to pay "time-and-a-half." Plaintiffs assert that Tyson's "gang time" compensation system failed to compensate them fully for time spent "donning," "doffing," and cleaning personal protective equipment (PPE) and walking to and from their work stations.

The district court permitted plaintiffs to "prove" classwide liability and damages by statistical evidence that created a purely hypothetical "average" employee and presumed that all class members were identical to that hypothetical "average" employee. Plaintiffs' expert, Dr. Kenneth Mericle, computed an "average time" spent by employees to donning, doffing, and walking to and from the production line, based on a time study in which Dr. Mericle observed a small sample of Tyson employees performing what he deemed to constitute donning and doffing activity. Dr. Mericle then extrapolated those sample observations to all employees, and concluded that the *average* class member spent between 18 and 21.25 minutes each work day (depending on the department in which she

worked) on donning, doffing, and walking.[2] Respondents submitted testimonial evidence of the donning/doffing times of only three individual members of the class, but that testimony diverged sharply as between the witnesses and diverged drastically from Dr. Mericle's "average." There were significant differences, however, in the types of personal protective equipment individual workers wore, and differences in the amount of time each worker spent on equipment donning, doffing, and cleaning. There were also differences in the amount of time Tyson compensated individual workers for donning, doffing and cleaning activities, as well as differences in the total number of hours individual workers spent on other work activities in any given week. Thus the damages, if any, to which a worker might be entitled could vary considerably.

Another of Respondents' experts, Dr. Liesl Fox, examined Tyson's time records to determine which employees had worked overtime and, based on Dr. Mericle's construct of the "average" employee time, calculated what she contended was the additional overtime compensation owed by Tyson to the class as a whole.

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[2] Dr. Mericle readily conceded wide variations in individual donning and doffing time (because some employees were required to wear considerably more PPE than others and because completion times vary based on the manner in which PPE is donned and doffed), with some employees requiring considerably less than the "average" time to complete the activity.

In the district court, Tyson objected repeatedly to class certification, arguing that any effort to prove class-wide liability on the basis of Dr. Mericle's time study amounted to the very "trial by formula," eschewed and criticized in *Wal-Mart*, which prevented Tyson from litigating its defenses to individual claims.

The district court nevertheless certified a Rule 23 class of more than 3,300 employees and conditionally certified an FLSA collective action of 444 workers, all of whom are also members of the Rule 23 class, see Pet. App. 110-111a; J.A.117, concluding that the legality of the compensation system was a "common question" that predominated over individualized questions of injury or damages. The trial court denied Tyson's repeated motions to decertify the class.

Mericle's study was fatally flawed for numerous reasons. First, Mericle conceded that his time measurements included employees who performed different jobs and donned and doffed different equipment, J.A.349-350, 351, 383, and that this resulted in "a lot of variation." J.A.387. There were material variations in Mericle's measured time for Processing workers' pre-shift donning of equipment, ranging from half a minute to ten minutes (a 20-fold disparity). J.A.142. For Slaughter workers Mericle observed employees take from 0.2 to 5.7 minutes to doff and clean equipment after their shift (a 28-fold disparity). J.A.143. Mericle conceded that these wide disparities were observed for each "activity"

measured, because "some of [the workers] put on more equipment than others." J.A.385-386.

Second, Mericle made no attempt to ensure that his time study was based on a statistically representative sample of class members. J.A.359. Mericle's study was not based on a "random sample."

Third, Mericle made no effort to control for all the different combinations of equipment worn by individual workers, differences that resulted both from variations in the equipment required for different jobs and differences in optional equipment individual workers chose to wear, id. Mericle conceded that there were wide variations in individual donning and doffing time because some employees were required to wear considerably more personal protective equipment than others and because completion times varied based on the manner in which equipment is donned and doffed and because some employees required considerably less than the "average" to complete the donning and doffing activities.
Fourth, Mericle included in his "average" time spent cleaning knife-related equipment at the end of the shift, *see* J.A.123-124, even though not all employees had to rinse their equipment at the end of their shift. Compare J.A.222 with J.A.226-227.

Fifth, Mericle did not account for the fact that employees were compensated for any donning/doffing-related activities when they had setup or tear down responsibilities. J.A.433. Mericle also included in his computations

employees who donned some equipment once they were on the line and thus already on being paid gang-time. J.A.369.

At trial the actual evidence from the few class members who testified was at odds with Mericle's assumptions, observations and calculations. These witnesses acknowledged that Tyson required employees with different tasks to wear different personal protective equipment, depending on their job; they also confirmed that some employees chose to wear additional or different items, depending on their personal preferences. J.A.276-277; J.A.283-284; J.A.315. Additionally, these workers testified that they donned and doffed pieces of equipment in different sequence, in different places, and that each piece requires a different amount of time to put on or take off. J.A.272, 297-302, 308-309, 318-319, and thus it took each of them a different amount of time to perform each of Dr. Mericle's "activities." None of their donning and doffing times matched Mericle's "averages," and their times were often well below Mericle's "average." *See* J.A. 142-143, J.A.260, J.A.288, J.A.309. On cross-examination each employee revised downward the time estimate he made during direct. See J.A.270-272; J.A.297, 301-302; J.A.316-319.[3]

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[3] The significant individual differences and Mericle's failure to account for them in his study mean that Mericle's average times did not establish whether *any* employee was actually undercompensated.

Plaintiffs' damages expert, Dr. Fox, testified that classwide damages were $6,686,082.36 for the Rule 23 class action and $1,611,702.44 for the FLSA collective action if one assumed, as she did, that every class member took Mericle's "average" times. J.A.410, 417-418; J.A.139. She conceded, however, that the figures would be different if one assumed that employees spent different amounts of time on donning, doffing, and washing equipment, and walking to and from their workstations. J.A.419.

Most significantly, Fox acknowledged that, even if one assumed that every employee worked the average time from Mericle's study, the class included at least 212 workers who suffered no injury at all, because adding Mericle's estimated time to their paid time did not result in those employees working any unpaid overtime. J.A.415. She also testified that if Mericle's average donning/doffing times were reduced, the number of uninjured workers would increase (and the number properly in the class would decrease commensurately) because their work hours fell below 40 for a given week or because they were fully compensated for their time. J.A.424-425.[4]

The jury found Tyson liable for failing to pay required overtime and awarded $2.9 million in

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[4] The Eighth Circuit panel said that "The fact that individuals will have claims of differing strengths does not impact on the commonality of the class as structured." Pet.App. at 9a (citation omitted).

damages to the class as a whole, less than half the amount Fox had calculated for the Rule 23 class. J.A.467.

After trial, the district court denied Tyson's renewed motions for decertification of the class and for judgment as a matter of law, finding that the testimony of Dr. Mericle and Dr. Fox provided sufficient evidence upon which the jury could base class-wide findings of liability and damages. Pet. App. 25a-30a. The district court denied Tyson's motions because whether "donning and doffing and/or sanitizing of the PPE. .constitutes 'work'" was a common question susceptible to common proof, Pet.App. 37a, and that there were "numerous factual similarities among the employees paid on a 'gang time' basis." *Id.*

A divided Eighth Circuit panel affirmed. While conceding that "individual plaintiffs varied in their donning and doffing routines," the appeals court held that Dr. Mericle's study created a "just and reasonable inference" that *all* class members worked more hours than the hours for which they were compensated. *Id.* at 12a. The court of appeals rejected Tyson's argument that Dr. Mericle's study was not capable of proving class-wide liability or damages. The circuit court panel majority said that "using statistics or samples in litigation is not necessarily trial by formula," Pet.App. at 10a-11, and citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946) for the proposition that the jury could infer both class-wide liability and damages from the study. Pet.App. at 11a-13a.

While recognizing that "individual plaintiffs varied in their donning and doffing routines," Pet.App. 8a, and that plaintiffs "rely on inference from average donning, doffing, and walking times" to calculate the amount of uncompensated work time, Pet.App. at 11a, the majority held that because "Tyson had a specific company policy" and the "class members worked at the same plant and [workers] used similar equipment," this inference is permitted by this Court's decision in *Mt. Clemens*, 328 U.S. 680, 687. Pet.App. at 8a. The majority concluded that applying the average donning/doffing times to individual employee time records "prove[d] liability for the class as a whole." *Id.* at 10a.

Judge Beam, dissenting, pointed out the numerous differences between the class members in donning and doffing times, K-Code payments, abbreviated gang time shifts, and other relevant factors. Pet.App. 23a. He further noted, "While all class members were subject to a common policy – gang-time payment," there was "no 'common answer[]' arising from the evidence concerning the individual overtime pay questions at issue in this case" because, *inter alia*, the amount of time individual employees spent donning and doffing varied. *Id.* Judge Beam also said that class certification was inappropriate because it was undisputed that the class included hundreds of uninjured employees, and that by certifying a class with hundreds of uninjured employees, the district court forced Tyson to pay employees whom it had fully compensated. Pet.App. 22a.

SUMMARY OF ARGUMENT

The district court certified the class and collective action, and the court of appeals panel majority affirmed, without conducting the rigorous analysis required by Rule 23 to ensure that the employees were "similarly situated," see *Wal-Mart*, 131 S.Ct. at 2551, and the "more demanding" inquiry under Fed. R. Civ. P 23(b)(3) to ensure that questions of law or fact common to the class predominated over individual questions, see *Comcast*, 133 S.Ct. 1426, 1432.

The courts below erred by allowing plaintiffs to "prove" injury and damages on a classwide basis with statistical sampling that disguised very significant individual differences between putative class members. Plaintiffs were allowed to "prove" classwide liability and damages by applying Mericle's average donning/doffing times to all class members even though those averages do not reflect the actual time worked by any class member. *Wal-Mart* makes it clear that such a "Trial by Formula" lowered plaintiffs' burden of proof and violated Tyson's due process right to raise every available defense, in violation of the Rules Enabling Act, 28 U.S.C. §2072(b).

The panel majority mistakenly read *Mt. Clemens* to permit the use of averaging in these circumstances, but *Mt. Clemens* held only that an employee carries his burden of proving entitlement to damages under the FLSA "if he proves that he has in fact performed work for which he was improperly compensated and if he produces

sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." 328 U.S. 680, 687.[5] An employee cannot prove that *she* performed overtime work for which *she* was not properly compensated with evidence of the amount of time worked by a hypothetical "average" employee derived from a sample of different employees who performed different work activities and whose activities took different amounts of time to perform. As the Seventh Circuit explained in *Espenscheid* v. *DirectSat USA, LLC*, 705 F.3d 770, 774 (7th Cir. 2013), that approach confers a "windfall" on some class members while undercompensating others.

The decision below is fatally flawed because the class and collective action includes hundreds of uninjured class members who are beneficiaries of the class judgment. Article III only permits federal courts to provide redress for an "injury in fact" that is traceable to the conduct of the defendant. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The FLSA likewise assigns federal courts the authority to award damages to employees who were injured by working overtime without receiving statutory mandated compensation. 29 U.S.C. §216(b). The *procedural* devices of a class action or collective action do not expand the *substantive* jurisdiction of the federal courts to

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[5] *Mt. Clemens* was an FLSA case, and arguably does not even apply to the much larger Rule 23 class in this case.

provide damages remedies to individuals who have no injury.

Constitutional and statutory standing requirements permit a court to certify a class only if plaintiffs can prove with common evidence that *all* class members were injured, or that there is a mechanism for identifying the uninjured class members and ensuring that they will not recover damages. Proceeding with class litigation in the absence of such showings alters substantive rights and deprives the defendant of its due process right to raise every available defense. In this case, plaintiffs' own damages expert acknowledged that there are hundreds of class members who worked no unpaid overtime and thus were not entitled to any additional compensation.

ARGUMENT

I. A RULE 23 CLASS ACTION MAY NOT BE CERTIFIED ON THE BASIS OF STATISTICAL EVIDENCE THAT DOES NOT ACCOUNT FOR DIFFERENCES AMONG INDIVIDUAL CLASS MEMBERS.

The Eighth Circuit affirmed certification of a plaintiff class consisting of more than 3,300 employees seeking to recover overtime wages, despite wide variations of work duties, hours worked, and compensation actually received by individual workers, based solely on a study that purported to calculate the amount of time it took a hypothetical "average" employee to don and doff work equipment and to walk to and from the production line, based on observations of a small

sample of employees. The "average" was at odds with the testimony of the workers who actually appeared as witnesses at trial. That holding cannot be squared with *Wal-Mart*.[6]

To obtain class certification in a case seeking damages, the class representatives must demonstrate that "there are questions of law or fact common to the case," Rule 23(a)(2), and that "questions of law or fact common to class members predominate over any questions affecting only individual members." Rule 23(b)(3).

A "class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Comcast*, 133 S.Ct. at 1432 (quoting *Califano* v. *Yamasaki*, 442 U.S. 682, 700–01 (1979)); *Wal-Mart*, 131 S.Ct. at 2550 (same). Accordingly, a party seeking to maintain a class action must be prepared to show that the numerosity, commonality, typicality, and adequacy- of-representation requirements of Rule 23(a) have been met, and courts must conduct "'a rigorous analysis'" to ensure that plaintiffs can satisfy the requisites of Rule 23(a) – *i.e.*, that there "are *in fact* sufficiently numerous parties, common

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[6] In a class action, a defendant cannot typically raise individualized defenses. A defendant is not permitted to conduct discovery on each class member's individualized issues, and such discovery would frustrate the rationale behind Rule 23. It is not feasible to call hundreds or thousands of class members at trial; doing so would also be inconsistent with the rationale for class actions, but judicial economy cannot trump constitutional rights.

questions of law or fact," typicality of claims or defenses, and adequacy of representation. *Wal-Mart*, 131 S.Ct. at 2551-52 (emphasis in original).

Wal-Mart made it clear that the Rule 23(a)(2) "commonality" requirement is demanding:

> Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury. Their claims must depend upon a common contention – for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

Wal-Mart, 131 S. Ct. at 2551.

"Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a) and Congress added "procedural safeguards for (b)(3) class members beyond those provided for (b)(1) or (b)(2) class members (*e.g.*, an opportunity to opt out), and the court's duty to take a 'close look' at whether common questions predominate over individual ones." *Comcast* at 1432 (citations omitted). Rule 23(b)(3) imposes a "duty [on courts] to take a close look at whether common questions predominate over individual ones." *Ibid.*

Meeting the predominance requirement entails more than adducing common evidence; the plaintiffs must also show that they can prove, through common evidence, that all class members were in fact injured by the same acts or omissions of defendant. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997); *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S.Ct. 2179, 2184 (2011). The determination whether "'questions of law or fact common to class members predominate'" cannot be made if the requirements to prove the underlying claim reveal "'some fatal dissimilarity' among class members that would make use of the class-action device inefficient or unfair." *Amgen*, 133 S.Ct. 1184, 1197 (2013).

Plaintiffs argued, and the lower courts agreed, that the different amounts of time individual workers spent donning and doffing personal protective equipment did not foreclose class treatment, because plaintiffs could prove their case using the averages derived from Mericle's study.

The testimony of plaintiffs' own experts shows in this case that such "fatal dissimilarities" exist in this case – both as to actual donning and doffing activities and times, and as to actual underpayment, if any. In this case, the evidence is that the time devoted to donning, doffing, and walking by workers varied considerably from employee to employee, depending on numerous variables. As plaintiffs' damages expert agreed, whether that donning/doffing/walking time entitled an employee to overtime pay depends on

whether that employee otherwise worked 40 or more hours during the week in question and whether he was already paid for that time. Those individual issues of fact determine whether Tyson is liable to an employee for unpaid wages and, if so, the amount of damages.

Plaintiffs' own evidence shows that there was substantial variance in the amount of time individual class members spent in donning, doffing, and cleaning personal protective equipment each day. The three class members who provided "representative" testimony at trial testified that each wore different items and spent different amounts of time, ranging from more than two minutes to almost 12 minutes on donning/doffing activities. See J.A.317-319; J.A.266-267; J.A.287-288.

Mericle, plaintiffs' principal expert witness, testified that there were "different [times] for every single person. [he] measured." J.A.387. Mericle's time study shows wide variations in the amount of time employees spent donning and doffing different equipment. On the Processing floor, for example, employees spent between 0.583 minutes and 10.333 minutes donning equipment in the locker room before the shift began(an almost 1800 percent variance), and between 1.783 minutes and 9.267 minutes doffing and storing equipment after the shift ended (a 520 percent variance). See J.A.142. On the Slaughter floor, employees spent between 2.1 and 13.28 minutes donning equipment in the locker room pre-shift (a

632% variance), and between 1.967 and 5.517 minutes doffing and storing equipment post-shift (a "mere" 280 percent variance). See J.A.143.[7]

These factual differences raise numerous individualized issues that clearly predominated over any common factual or legal questions about the calculation of the hours in employees' "workweek." The relevance of individualized damages issues to Rule 23(b)(3)'s predominance requirement is critical; it is a key threshold question in cases in which certification of a damages class is sought. If plaintiffs fail to present a viable method of calculating damages on a classwide basis, "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class," precluding certification. 133 S. Ct. at 1433 See *Comcast*, 133 S.Ct. at 1433. In *Comcast*, this Court held that an antitrust class action was "improperly certified under Rule 23(b)(3)" because plaintiffs' damages model fell "far short of establishing that damages [were] capable of measurement on a classwide basis" and thus the plaintiffs could not "show Rule 23(b)(3) predominance." 133 S. Ct. at 1432-33. We submit that the damages model proffered by plaintiffs in this case, and accepted by the courts below, also

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[7] In addition, some class members were paid to come in before or stay after gang time to set up or clean the production line, and they may don and doff their protective equipment during the set-up or clean-up time for which they are paid, adding further variation in time worked or time paid.

failed to prove damages either for any individual or for the class.

The existence of these individual issues should have precluded class certification. The lower courts erred in failing to recognize the impact and significance of these "'fatal dissimilarit[ies],'" *Amgen*, 133 S.Ct. at 1197, in the predominance determination under Rule 23(b)(3) and the "similarly situated" determination under the FLSA.

Plaintiffs' statistical evidence disguised the vast individual differences and thus did not "prove" injury and damages for any class member. These averages were "proof" only nothing more than the injury and damages "suffered" by a hypothetical plaintiff, unmoored from any evidence of actual injury to any real human.

It is for reasons such as these, we submit, that *Wal-Mart* makes it clear that determining a defendant's liability to a class by extrapolation from the average of a sample is a flawed approach that cannot be used to avoid individual inquiries and thereby to aggregate thousands of individual claims in a single class action. Such a "Trial by Formula" impermissibly abridges a defendant's rights under the Due Process Clause and the Rules Enabling Act, 28 U.S.C. §2072(b), requires that the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right." *Wal-Mart*, 131 S.Ct. at 2561.

In individual trials, Tyson could respond to a plaintiff's claim for unpaid donning and doffing

time by demonstrating, through cross-examination of the plaintiff or the testimony of other employees, that it took (or reasonably could have taken) much less time to don and doff the particular equipment that the plaintiff wore, or Tyson could show that the plaintiff was compensated for time spent donning and doffing.

The Eighth Circuit tried to distinguish *Wal-Mart* on the grounds that "[h]ere, plaintiffs do not prove liability only for a sample set of class members. They prove liability for the class as a whole, using employee time records to establish individual damages." Pet.App. 10a; see also *id.* at 13a. This distinction is illusory. Although plaintiffs' expert Dr. Fox added the average donning/doffing times to the class members' actual time records, the average times were the essential "fact" to prove liability – whether any individual class member worked more than 40 hours without receiving overtime compensation – and the amount of damages. Thus here, as in *Wal-Mart*, classwide liability was based on extrapolation and the erroneous contention that each class member spent the same "average" amount of time donning, doffing, washing, and walking. As in *Wal-Mart*, there was no individualized inquiry into whether individual class members were actually injured and, if so, the amount of damages to which they were entitled.

The court of appeals majority upheld plaintiffs' use of averages on the theory that drawing "inference[s]" from such evidence was "allowable"

under *Mt. Clemens*. Pet.App. 8a. The panel, we submit, misread *Mt. Clemens*. This Court in *Mt. Clemens* held that certain "preliminary activities" and the time necessarily spent walking from the time clock to the work bench were compensable work. 328 U.S. at 692. The Court therefore reversed the court of appeals, which had denied damages for the preliminary activities because it thought plaintiffs had failed to prove "the extent of overtime worked." *Id.* at 686. The Court deemed this an "improper standard of proof." *Id.* An employee "has the burden of proving that he performed work for which he was not properly compensated," but the "employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated. and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. .[t]he burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." *Id.* at 686-88. Recovery of "uncertain and speculative damages" is precluded "only to situations where the *fact of damage* is itself uncertain" and the "*uncertainty lies only in the amount of damages*." *Id.* at 688 (emphases added). The Court therefore remanded "for the determination of the amount of walking time involved and the amount of preliminary activities performed. .and calculating the resulting damages." *Id.* at 694.

In the case at bar, averages and inferences, rather than direct evidence, were used to prove that each class member performed work for which she was not properly compensated as well as the measurement of the time expended to perform that work.[8]

Certifying the class in this case deprived Tyson of the ability to litigate defenses to individual claims. When the district court held that Tyson's liability to the entire class depended on whether Tyson paid sufficient overtime to the hypothetical

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[8] As Judge Posner explained in *Espenscheid* v. *DirectSat USA, LLC*, 705 F.3d 770, 775, extrapolation from a sample is an accurate measure of other class members' unpaid overtime only if everyone in the class has the same duties that take essentially the same amount of time to perform, which is *not* the case here. The Seventh Circuit held that no class action could be certified because the amount of damages actually owed, if any, depended on the job duties and personal circumstances of individual class members. *Id.* at 773, 776. The Seventh Circuit rejected plaintiffs' proposal "to get around the problem of variance by presenting testimony at trial from 42 'representative' members of the class" because, inter alia, no random sampling had been performed. *Id.* at 774. To extrapolate from the experience of the 42 to that of the 2341" other class members, the court held would require that all 2341 "have done roughly the same amount of work. . ." *Id.*

Mericle admitted that his study in this case was not a "random sample," J.A.359. The "variance" between the lowest times and the highest times were so great that an "average" was misleading. Moreover, in the instant case, the "sample" testimony did not square with Mericle's data points.

"average" employee, Tyson could not avoid liability by demonstrating that class counsel had failed to show that specific class members were inadequately compensated.

The Eighth Circuit's certification of the class is not consistent with *Wal-Mart*. As this Court explained in *Wal-Mart*, class certification under the circumstances amounts to an impermissible "Trial by Formula." 131 S. Ct. at 2541. "Because the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge, or modify any substantive rights,' 28 U.S.C. § 2072(b), this Court held "a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims." *Id.*[9]

II. CLASS CERTIFICATION WAS IMPROPER BECAUSE ARTICLE III's INJURY-IN-FACT REQUIREMENT WAS NOT SATISFIED BY ALL CLASS MEMBERS.

Article III permits federal courts to provide redress only for actual injuries that are fairly traceable to a defendant. *Lujan v. Defenders of*

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[9] The FLSA authorizes a collective action by one or more employees to bring "in behalf of himself or themselves and other employees similarly situated" to recover "unpaid minimum wages, or their unpaid overtime compensation" 29 U.S.C. §216(b). The requirement that the plaintiffs be "similarly situated" to the employees they seek to represent should require an analysis similar to that under Rule 23(b)(3). *See Espenscheid*, 705 F.3d at 772. In this case, the district court certified a Rule 23(b)(3) class (for litigation of the Iowa state law claims) and a collective action (for litigation of the FLSA claims), and both were tried together.

Wildlife, 504 U.S. 555, 560; see also *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) and *Lewis* v. *Casey*, 518 U.S. 343, 349 (1996) (judiciary's role is "to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm"). "First, and foremost, there must be alleged (and ultimately proven) an 'injury in fact' – a harm suffered by the plaintiff that is 'concrete' and 'actual and imminent, not 'conjectural' or 'hypothetical.'" *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102-103 (1998) (citations omitted).[10] Article III "injury-in-fact" requirement must be satisfied at each "stag[e] of the litigation." *Lujan*, 504 U.S. 555, 561 (1992). "Courts have no power to presume and remediate harm that has not been established," and "[t]his is no less true with respect to class actions than with respect to other suits." *Lewis* v. *Casey*, 518 U.S. at 357-58 & 360 n.7; see also *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 831 (1999) (Rule 23 "'requirements must be interpreted in keeping with Article III constraints.'") (quoting *Amchem*, 521 U.S. at 612-13).

Rule 23 class actions may aggregate only claims that could be brought individually. This Court has consistently held that class certification cannot provide a right to relief in federal court that the Constitution would deny them if they sued separately. *See, e.g., Philip Morris USA Inc. v.*

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[10] The FLSA similarly requires that an employee establish that her "damage is . . . certain." *Mt. Clemens*, 328 U.S. at 688.

Scott, 131 S. Ct. 1, 3 (2010) (recognizing a due-process violation when "individual plaintiffs who could not recover had they sued separately *can* recover only because their claims were aggregated with others' through the procedural device of the class action"); *Amchem*, 521 U.S. 591, 612-13 (1997) ("Rule 23's requirements must be interpreted in keeping with Article III's constraints.").

In this case, the Eighth Circuit majority upheld certification of a class and collective action that included hundreds of plaintiffs who were not injured and allowed them to collect damages. As shown above, plaintiffs' damages expert admitted that the class includes at least 212 employees who were not injured because they did not work *any* unpaid overtime even if they worked the average time claimed in Mericle's study.

As Judge Beam observed in his dissent from the court's denial of rehearing, the district court's "lump sum judgment contains no discernible guidelines sufficient to establish the individual damages due to the limited number of members of the certified class with provable damages" and "[n]either the district court nor the panel majority offer any instructions for, or insight into, how this judgment may be lawfully and fairly executed and by whom." Pet. App. 126a.

The desire for judicial economy override compliance with the standing requirements of Article III and also violates the rule that the Federal Rules of Civil Procedure "do not extend"

the "jurisdiction of the district courts." Fed. R. Civ. P 82; *see Amchem*, 521 U.S. at 613.

CONCLUSION

The rulings below are inconsistent with due process, Article III, the Rules Enabling Act and the FLSA and the judgment of the court of appeals should be reversed.

Respectfully submitted,

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